STATE SOCIALISM AND THE SCHOOL LAND GRANTS

IN the year 1904 Professor A. V. Dicey made the significant and, what in the light of the present situation in Great Britain may now be termed, the prophetic statement, "We all of us in England still fancy at least that we believe in the blessings of freedom, yet, to quote an expression which has become proverbial, 'To-day we are all of us socialists.'" [1]

If this statement was and is true of England, it is also to-day true in a great many of our western states; and though in none of them do the farmers and the people generally believe in pure socialism, which, as we understand it, is the government ownership and control of all of the agencies of production, they are strenuously insisting upon that control in all cases where they are not individually affected and their personal ownership is not liable to be called into account.[2] In some of these states, noticeably North and South Dakota, experiments are already being inaugurated which, if unsuccessful,— and many of them are sure to be unsuccessful,[3]—will be disastrous in their consequences, and will not only squander the public resources of the present, but will impose an immense burden of taxation upon those of the future. To the average man in the East the movement is only an interesting experiment which he is perfectly willing shall be tried at the expense of the people of a state other than his own. To the thoughtful

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[1] This statement was, we believe, also paraphrased by Professor Dicey in a lecture before the Harvard Law School into the words "Scratch an Englishman and you will find a socialist."

[2] It is a noticeable fact that the socialist movement in North and South Dakota and the neighboring western states in no way involves farm lands, and that the socialistic orators seem sedulously to avoid the subject. Nor do the employers' liability acts cover farm labor, though it is a matter of common knowledge that the accidents to employees upon the farms far outnumber those in the factories and on the railroads.

[3] The state of North Dakota, for instance, has by constitutional amendment and legislative enactment authorized the erection and maintenance of state-owned elevators, mills, packing-houses, stockyards, creameries, cheese factories, insurance companies, and banks, and has by constitutional amendment given to the legislature and to the municipalities the power to engage in any industry that they please.

men and women of the states affected, however, the situation is entirely different, for there is a love of home and a state pride even in the West, and the disruption of government and the squandering of his state's resources are matters in which no honest man can feel unconcerned.

In the past, however, the conservative citizen has in a large measure remained silent and has allowed the seeds to be sown and the doctrines of discontent and of socialism to be everywhere preached without any protest on his part or any attempt to inculcate in the minds of the voters the principles of sane economics. He has left all of the propaganda to the socialist and to the agitator. He has even in many instances allowed conditions to arise which have created discontent, and has sown the wind which has now become the whirlwind. This silence has in part been due to the habitual, but none the less criminal, indifference of the average business and professional man to public affairs. It much more, however, has been due to his ignorance of constitutional law and of the powers of the federal courts and of the federal government and to the false feeling of security which this ignorance has entailed. He has led himself to believe that no matter how radical the legislation may be and no matter how radically a temporary majority may seek to amend the constitution of his own state, the provisions of the Federal Constitution which deny to a state the right to deprive any person of life, liberty, and property without due process of law, and which guarantee to each state a republican form of government, can always be relied upon, and that, at some time or other, the federal authorities and the federal courts will come to his relief. His ever present illusion is that the guaranty of a republican form of government prohibits a state from engaging in what he calls "private business," and that state socialism is antagonistic to the fourteenth amendment, and generally to the spirit, if not the letter, of the Federal Constitution, and will be ultimately checked by the might of the federal power.

In these conclusions the conservative has reckoned without his host. It has been held by both the state and the federal courts that

"Courts are not at liberty to declare a statute unconstitutional because, in their opinion, it is opposed to the fundamental principles of republican government, unless those principles are placed beyond legislative en-

croachment by the constitution; or because it is opposed to a spirit supposed to pervade the constitution, but not expressed in words, or because it is thought to be unjust or oppressive, or to violate some natural, social, or political rights of the citizen, unless it can be shown that such injustice is prohibited or such rights are protected by the constitution.

"Except where the constitution has imposed limitations upon the legislative power, it must be considered as practically absolute; and to warrant the judiciary in declaring a statute invalid they must be able to point to some constitutional limitation which the act clearly transcends."[4]

It is a recognized principle of constitutional law that, except where limitations are imposed by the federal or state constitution, the power of the legislature is unlimited and practically absolute, and that therefore it covers the whole range of legitimate legislation. The general rule is that if limitations upon its exercise are not found in the constitution they do not exist. It is sometimes said that an act cannot be opposed to the spirit of the constitution; "yet the spirit of a constitution is to be collected chiefly from its words."[5]

It is one thing to seek by state legislation to prevent a person from conducting any lawful business that he pleases and which is not harmful to the general public. It is quite another thing for the state itself, and for imagined purposes of public good, though leaving the individual, except as to state competition, as free as

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[4] Mitchell, J., in State *v.* Corbett, 57 Minn. 345, 59 N. W. 317 (1894); State *ex rel.* Linde *v.* Taylor, 33 N. D. 76, 86, 156 N. W. 561 (1916).

[5] Sturgis *v.* Crowinshield, 4 Wheat. (U. S.) 122, 202 (1819); Jacobson *v.* Massachusetts, 197 U. S. 11, 25 Sup. Ct. Rep. 358 (1905). See also People *v.* Fisher, 24 Wend. (N. Y.) 215, 220 (1840); State *v.* Turner, 37 N. D. 635, 164 N. W. 924, 936 (1917). "The public policy of a state is to be found in its constitution and statutes, and only in the absence of any declaration in these instruments may it be determined from judicial decisions. In order to ascertain the public policy of a state in respect to any matter, the acts of the legislative department should be looked to, because a legislative act, if constitutional, declares in terms the policy of the state and is final so far as the courts are concerned. All questions of policy are for the determination of the legislature, and not for the courts, and there is no public policy which prohibits the legislature from doing anything which the constitution does not prohibit." 6 R. C. L. 109. Hunter *v.* Pittsburgh, 207 U. S. 161, 28 Sup. Ct. Rep. 40 (1907); Red "C" Oil Manufacturing Company *v.* Board of Agriculture of North Carolina, 222 U. S. 380, 32 Sup. Ct. Rep. 152 (1912).

before, to enter into such a business. Although, it has been stated to be

"The right of every citizen of the United States to follow any lawful calling, business, or profession he may choose, subject only to such restrictions as are imposed on all persons of like age, sex and condition. This right may in many respects be considered a feature of our republican institutions."

And again,

". . . every republican government is in duty bound to protect all of its citizens in the enjoyment of equality of rights,"[6]

the cases which have asserted this doctrine were only concerned with infractions on the personal liberty and industrial freedom of individual classes and of the right of one man to the same treatment that was afforded his neighbors. None of them passed upon or considered the rights of the state itself. Nowhere, indeed, is there any federal holding that, provided the individual citizen is protected in his personal rights and the representative form of government is preserved, the state, that is to say the citizens as a whole, may not engage in any business or enterprise that it pleases.[7] It has even been held that

"Whether a state has a republican form of government is a political and not a judicial question, and therefore is to be determined not by the courts but by the political department of the federal government, that is by the Congress, and the decision of Congress is binding on every other department and cannot be questioned in any judicial tribunal."[8]

Even though the social programs of the western states may be revolutionary in their nature and are largely brought about by means of the initiative, the referendum, and the recall, which as a means of law making are in themselves dangerous to property rights, subversive of a stable government, and in their essential

[6] Dent *v.* State of West Virginia, 129 U. S. 114, 121, 9 Sup. Ct. 231, 232 (1889); Minor *v.* Happersett, 21 Wall. (U. S.) 162 (1874); United States *v.* Cruikshank, 92 U. S. 542 (1874).

[7] Such, however, was the holding of the state court in Rippe *v.* Becket, 56 Minn. 100, 57 N. W. 331 (1894).

[8] 6 R. C. L. 44; State *v.* Summers, 33 S. D. 40, 144 N. W. 730 (1913); Luther *v.* Borden, 7 How. (U. S.) 1, 12 (1849); Taylor *v.* Beckham, 178 U. S. 548, 20 Sup. Ct. Rep. 890, 1009 (1900); Pacific States Tel. & Tel. Co. *v.* State of Oregon, 223 U. S. 118, 32 Sup. Ct. 224 (1912); Kiernan *v.* Portland, 57 Ore. 454, 111 Pac. 379, 112 Pac. 402 (1910).

nature unrepublican, it is quite clear that no comfort can be obtained from the federal guaranty of the republican form of government. The measures indeed are democratic and not monarchical; popular and not aristocratic. They still leave room for many of the representative features of the real republic. Though indeed the term "Republican" was frequently used in the debates and discussions which led up to the adoption of the constitution as an opposite to and as contrasted with a pure democracy, and so implying a representative form of government, it was so used in speaking of the new and central government alone, and it can be hardly possible that the framers of the national charter concerned themselves with or sought to control the local policies of the several states except in so far as it was necessary to formulate an interstate Monroe Doctrine which should guarantee for the union that which President Monroe afterwards guaranteed for the whole continent. The guaranty, in short, related to the form of government and source and center of ultimate sovereignty, and not to the economic policies which the sovereign majority might see fit to inaugurate. It had no relation to property rights. It was not a bulwark against socialism or collectivism, but against aristocratic and monarchical institutions. Its scope was clearly outlined by Madison when in The Federalist he said:

"In a confederacy founded on republican principles, and composed of republican members, the superintending government ought clearly to possess authority to defend the system against aristocratic, or monarchical innovations. The more intimate the nature of such an union may be, the greater interest have the members in the political institutions of each other; and the greater right to insist, that the forms of government under which the compact was entered into, should be *substantially* maintained." [9]

When we come to the fourteenth amendment we find a stronger argument for the conservative but one which we believe will hardly be sustained by the courts. Here again we come to the question of state sovereignty, and the difference between the powers of the federal government, which are merely delegated, and those of the state legislatures and constitution-making bodies, which are original and inherent.

It is of course generally conceded that public revenues can only

[9] THE FEDERALIST, No. 43, p. 286.

be raised for public uses, and that a tax which is levied for any other purpose deprives the payer of property without due process of law.[10]

It by no means follows, however, that a state is denied the right to engage in or to levy taxes for the maintenance of an industry which was formerly private and which perhaps might even now be carried on by private enterprise, for the federal courts have already everywhere sustained statutes and constitutional provisions which have authorized the states, and even their municipalities, to engage in and to support, not only by special assessment but by general taxation also, improvements and industries such as irrigation districts, swamp reclamation schemes, municipal fuel yards, public sewers, gas and electric light plants, heating plants and similar enterprises, and have evinced a decided willingness to leave to the states themselves the determination of what is and what is not a public use.[11]

It is true that in the early case of *Loan Association* v. *Topeka*[12] the Supreme Court of the United States appeared to limit the right of taxation to matters pertaining to the machinery of government, and to sanction its use, if for industrial purposes at all, then only for such as "have been customarily and by long course of legislation levied;" but the statement is after all merely *dictum* and the decision is an old one. The case, indeed, has been followed by many others which impose no such limitations, and by that of *Jones* v. *City of Portland*,[13] where the same court said:

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[10] Loan Association *v.* Topeka, 20 Wall. (U. S.) 655 (1874).

[11] Fallbrook Irrigation District *v.* Bradley, 164 U. S. 112, 17 Sup. Ct. Rep. 56 (1896); Hagar *v.* Reclamation District, 111 U. S. 701, 4 Sup. Ct. Rep. 663 (1884); Davidson *v.* New Orleans, 96 U. S. 97 (1877); Jones *v.* City of Portland, 245 U. S. 217, 38 Sup. Ct. Rep. 112 (1917); Gibbs *v.* Consolidated Gas Co. of Baltimore, 130 U. S. 396, 9 Sup. Ct. Rep. 553 (1889).

[12] 20 Wall. (U. S.) 655, 665 (1874). Among other things the court said: "And in deciding whether, in the given case, the object for which the taxes are assessed falls upon the one side or the other of this line, they [the courts] must be governed mainly by the course and usage of the government, the objects for which taxes have been customarily and by long course of legislation levied, what objects or purposes have been considered necessary to the support and for the proper use of the government, whether State or municipal. Whatever lawfully pertains to this and is sanctioned by time and the acquiescence of the people may well be held to belong to the public use and be proper for the maintenance of good government, though this may not be the only criterion of rightful taxation."

[13] 245 U. S. 217, 38 Sup. Ct. Rep. 112 (1917). See also cases cited in note 11, *supra*.

"The decision of the case turns upon the answer to the question whether the taxation is for a public purpose. It is well settled that moneys for other than public purposes cannot be raised by taxation, and that exertion of the taxing power for merely private purposes is beyond the authority of the State. *Citizens Saving & Loan Association* v. *Topeka*, 20 Wall. 655.

"The act in question has the sanction of the legislative branch of the state government, the body primarily invested with authority to determine what laws are required in the public interest. That the purpose is a public one has been determined upon full consideration by the Supreme Judicial Court of the State upon the authority of a previous decision of that court. *Laughlin* v. *City of Portland*, 111 Maine, 486.

"The attitude of this court towards state legislation purporting to be passed in the public interest, and so declared to be by the decision of the court of last resort of the State passing the act, has often been declared. While the ultimate authority to determine the validity of legislation under the Fourteenth Amendment is vested in this court, local conditions are of such varying character that what is or is not a public use in a particular State, is manifestly a matter respecting which local authority, legislative and judicial, has peculiar facilities for securing accurate information. In that view the judgment of the highest court of the State upon what should be deemed a public use in a particular State is entitled to the highest respect."

The particular act which was under consideration in this case was one which provided for the establishment of municipal woodyards which should sell fuel at cost. We can hardly believe that the Supreme Court of the United States will make a distinction between a municipal and a state industry, or between a woodyard and the elevators, flour mills, packing houses, storage plants, cheese factories, banks, and other enterprises which are provided for in the socialistic programs of the western states.

If Congress may levy a prohibitive tariff (which of course is paid by the consumer) upon foreign manufactured goods in order that the manufacturing interests of the nation may be encouraged, it is difficult to see why the state may not levy direct taxes upon its citizens for the promotion of publicly owned enterprises which the majority of its citizens believe, however fatuously, will tend to encourage their paramount industries and obtain fair prices for their products. Taxation, it may be conceded, can only be used

for public purposes, but it will be hard to prove to the Supreme Court of the United States that a public purpose is not subserved by the maintenance of an industry which is owned by a state and from which the state derives all the profits. There can at any rate be no question that up to the present time the federal courts have generally left the questions of what are and what are not public uses, and what are and what are not the legitimate spheres of state enterprise and of state endeavor, to be determined by the state electorates, the state legislatures, and the state courts.

At least one federal district judge has held that such enterprises are public and has told us that:

"The line of legislative power has been steadily advanced as society has come to believe increasingly that its welfare can best be promoted by public as distinguished from private ownership of certain business enterprises. Laws which at one time were held invalid, have at a later period been sustained by the same court. No judge can investigate judicial decisions rendered during the past ten years without being impressed with the rapid extension of state activity into fields that were formerly private. The twilight zone that separates permissible from forbidden state action is broad. Business which will seem to one court to be public will seem to another to be private. . . . McQuillin on Municipal Corporations, section 1809, and the fifth edition of Dillon on Municipal Corporations, volume 3, section 1292, which contain the last word of text-writers on the subject, solemnly inform us that cities cannot be authorized to establish publicly owned coal and wood yards, because that would be using the taxing power for a private purpose. The next edition of these works will strike out this language and inform us that such yards are permissible, because they are for a public purpose and are publicly owned, citing Jones v. Portland, 245 U. S. 217. . . . Thus 'can' succeeds 'can't' in this field of law so rapidly that one can hardly tell which word he is looking at.

"What may be done by the state to protect its people and promote their welfare cannot be declared by *a priori* reasoning. New evils arise as the result of changing conditions. If the state remains static, while the evils that afflict society are changing and dynamic, the state soon becomes wholly inadequate to protect the public. The state must be as free to change its remedies as the evils that cause human suffering are to change their forms."[14]

[14] Amidon, District Judge, in Scott *v.* Frazier, 258 Fed. 669 (1919).

The only instances, indeed, where the federal courts have interfered have been where the tax was sought to be levied for the aid of industries or projects which were privately owned,[15] and it is quite clear that the question to be determined is not, was the business or enterprise formerly considered to be a private one, or is it even now capable of private management, but is the state or municipality itself the real owner, and is it acting for itself alone and not for the benefit or profit of some private individual?

But is there no hope in Israel? Can nothing be saved from the burning? How about the magnificent school land grants of the western states? If these and the funds derived therefrom can be saved as a guarantee of the permanence of popular education and of the Americanism of the West, and as a heritage not only to the children of the citizens of the present but to those of the generations yet unborn, many will be content. They will be satisfied to allow the experiments to be tried, and, if they fail, for the dancer to pay the fiddler in the shape of an increased present taxation and a present industrial ruin.

The danger to these grants and to these funds lies in the temptation to invest recklessly in the securities of state and municipal owned industries, many of which must necessarily fail, to divert the moneys from their proper funds in order that they may be loaned to such enterprises and swell the general balances of the state which will be constantly drawn upon, and perhaps, and in order that these funds may be replenished, to sell the lands themselves at lower figures than would otherwise have been obtained. The danger, we believe, is very apparent. It can, however, we also believe, be met and overcome by a rigid insistence, by those who are authorized to insist, upon the simple law of contracts and of trusts.

An example of the grants under consideration is furnished by those which are contained in the Congressional Act of February twenty-second, 1889, and which authorized the creation of the states of North Dakota, South Dakota, Montana, and Washington. Among other things this act provided:

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[15] Loan Association *v.* Topeka, 20 Wall. (U. S.) 655 (1874); Allen *v.* Inhabitants of Jay, 60 Maine, 124 (1872); Cole *v.* La Grange, 113 U. S. 1, 15 Sup. Ct. Rep. 416 (1884); Dodge *v.* Mission Township, 107 Fed. 827 (1901); City of Parkersburg *v.* Brown, 106 U. S. 487, 1 Sup. Ct. Rep. 442 (1882).

"Sec. 10. That upon the admission of each of said States [North Dakota, South Dakota, Montana, and Washington] into the Union sections numbered sixteen and thirty-six in every township of said proposed States . . . are hereby granted to the said States for the support of common schools. . . ."

"Sec. 11. That all lands herein granted for educational purposes shall be disposed of only at public sale, and at a price not less than ten dollars per acre, the proceeds to constitute a permanent school fund, the interest of which only shall be expended in the support of said schools. . . ."

"Sec. 14. That the lands granted to the Territories of Dakota and Montana by the act of February eighteenth, eighteen hundred and eighty-one, entitled "An act to grant lands to Dakota, Montana, Arizona, Idaho, and Wyoming for university purposes," are hereby vested in the States of South Dakota, North Dakota, and Montana respectively, if such States are admitted into the Union, as provided in this act, to the extent of the full quantity of seventy-two sections to each of said States . . . but said act of February eighteenth, eighteen hundred and eighty-one, shall be so amended as to provide that none of said lands shall be sold for less than ten dollars per acre, and the proceeds shall constitute a permanent fund to be safely invested and held by said States severally, and the income thereof to be used exclusively for university purposes. And such quantity of the lands authorized by the fourth section of the act of July seventeenth, eighteen hundred and fifty-four, to be reserved for university purposes in the Territory of Washington, as, together with the lands confirmed to the vendees of the Territory by the act of March fourteenth, eighteen hundred and sixty-four, will make the full quantity of seventy-two entire sections, are hereby granted in like manner to the State of Washington for the purposes of a university in said State. None of the lands granted in this section shall be sold at less than ten dollars per acre. . . ."

"Sec. 16. That ninety thousand acres of land, to be selected and located as provided in section ten, of this act are hereby granted to each of said States, except to the State of South Dakota, to which one hundred and twenty thousand acres are granted, for the use and support of agricultural colleges in said States, as provided in the acts of Congress making donations for such purposes.

"Sec. 17. That in lieu of the grants of land for purposes of internal improvements made to new States by the eighth section of the act of September fourth, eighteen hundred and forty-one, the following grants of land are hereby made, to wit:

"To the State of South Dakota: For the school of mines, forty thou-

sand acres; for the reform school, forty thousand acres; for the deaf and dumb asylum, forty thousand acres; for the agricultural college, forty thousand acres; for the university, forty thousand acres; for State normal schools, eighty thousand acres; for public buildings at the capital of said State, fifty thousand acres, and for such other educational and charitable purposes as the legislature of said State may determine, one hundred and seventy thousand acres; in all, five hundred thousand acres.

"To the State of North Dakota a like quantity of land as in this section granted to the State of South Dakota, and to be for like purposes, and in like proportion as far as practicable.

"To the State of Montana: For the establishment and maintenance of a school of mines, one hundred thousand acres; for State normal schools, one hundred thousand acres; for agricultural colleges in addition to the grant hereinbefore made for that purpose, fifty thousand acres; for the establishment of a State reform school, fifty thousand acres; for the establishment of a deaf and dumb asylum, fifty thousand acres; for public buildings at the capital of the State, in addition to the grant hereinbefore made for that purpose, one hundred and fifty thousand acres.

"To the State of Washington: For the establishment and maintenance of a scientific school, one hundred thousand acres; for State normal schools, one hundred thousand acres; for public buildings at the State capital, in addition to the grant hereinbefore made for that purpose, one hundred thousand acres; for State charitable, educational, penal, and reformatory institutions, two hundred thousand acres."

An example of the acceptance by the several states is also furnished by the Constitution which was adopted by the state of North Dakota as a prerequisite to its admission into the Union, and which among other things provides:

"Sec. 153, Art. 9. All proceeds of the public lands that have heretofore been, or may hereafter be granted by the United States for the support of the common schools in this state; all such per centum as may be granted by the United States on the sale of public lands . . . shall be and remain a perpetual fund for the maintenance of the common schools of the state. It shall be deemed a trust fund, the principal of which shall forever remain inviolate and may be increased but never diminished. The state shall make good all losses thereof."

"Sec. 159. All land, money or other property donated, granted or received from the United States or any other source for a University, School of Mines, Reform School, Agricultural College, Deaf and Dumb

Asylum, Normal School or other educational or charitable institution or purpose, and the proceeds of all such lands and other property so received from any source, shall be and remain perpetual funds, the interest and income of which together with the rents of all such land as may remain unsold shall be inviolably appropriated and applied to the specific objects of the original grants or gifts. The principal of every such fund may be increased, but shall never be diminished, and the interest and income only shall be used. Every such fund shall be deemed a trust fund held by the state, and the state shall make good all losses thereof."

"Sec. 162. The moneys of the permanent school fund and other educational funds shall be invested only in bonds of school corporations within the state, bonds of the United States, bonds of the state of North Dakota or in first mortgages on farm lands in the state, not exceeding in amount one third of the actual value of any subdivision on which the same may be loaned, such value to be determined by the board of appraisers of school lands."

"Sec. 165. The Legislative Assembly shall pass suitable laws for the safe keeping, transfer and disbursement of the state school funds; and shall require all officers charged with the same or the safe keeping thereof to give ample bonds for all moneys and funds received by them, and if any of said officers shall convert to his own use in any manner or form, or shall loan, with or without interest or shall deposit in his own name, or otherwise than in the name of the state of North Dakota or shall deposit in any banks or with any person or persons, or exchange for other funds or property any portion of the school funds aforesaid or purposely allow any portion of the same to remain in his own hands uninvested except in the manner prescribed by law, every such act shall constitute an embezzlement of so much of the aforesaid school funds as shall be thus taken or loaned, or deposited, or exchanged, or withheld, and shall be a felony; and any failure to pay over, produce or account for, the state school funds or any part of the same entrusted to any such officer, as by law required or demanded, shall be held and be taken to be *prima facie* evidence of such embezzlement."[16]

There can be no doubt that, under the Congressional acts and the state constitutional provisions which have been referred to, not only were valid contracts entered into but the several states were created trustees of the lands involved as well as of the proceeds of such as they should thereafter sell. There can also, we believe, be no question that a state may be a trustee and that

[16] Similar grants were made to and similar constitutional provisions adopted by nearly all of the western states.

"the statement that the crown or a state cannot be a trustee means no more than that the cestui cannot compel performance of the trust by bill in equity. . . . The cestui's proper course is to sue by petition — in England, to the Crown; in this country, to Congress or the Legislature."[17]

It is also clear that, though a state may not be sued by its own subjects or by its own agencies, an American state may be sued by its sovereign the United States, that if it assumes the relationship of a trustee it assumes the liabilities of the trust and that it and its officers can be held responsible in the federal courts.

The United States then has created the states of the West trustees of what may be termed charitable trusts, for though the property conveyed and the object of the grants is certain, the *cestuis que trust* are not only the children of the present generation but the children of the generations yet unborn, and the public schools, universities, and other schools were not only not in existence and were undefined at the time of the grant, but in a number of the states, noticeably North Dakota, have never at any time had any corporate entity and their trustees or regents have acted merely as agents of the state.[18]

In spite of these facts, however, and in spite of the clear expression of the terms and the conditions of the trust, both in the act of Congress and in the provisions of the constitution under which the grant was accepted and the state was admitted into the Union, there can be no question that there is to-day in the state of North Dakota a determined effort and purpose to violate this trust relationship, and that this effort, if successful there, will be repeated in other land grant states. It is an effort not entirely to repudiate the trust, but to use the funds for purposes which are not authorized and to further the cause of state socialism by loaning and investing the funds in a manner which can never be sanctioned and which would not be tolerated in the case of a personal trustee even under the so-called liberal Massachusetts rule of investment.

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[17] Notes to KENNESON'S CASES ON THE LAW OF TRUSTS, 91. "The king shall not be seized to another's use, because he is not compellable to perform the confidence." Dillon *v.* Fraine, Popham, 70, 72; President and Fellows of Yale College, 67 Conn. 237, 34 Atl. 1036 (1895); KENNESON'S CASES ON THE LAW OF TRUSTS, 90.

[18] Board of University and School Lands *v.* McMillan, 12 N. D. 280, 96 N. W. 310 (1903).

This purpose has not as yet been fully carried out but has in a measure been checked, at first by the determined efforts of a few hold-over senators in the legislature of 1917 and later by a few conservatives in the ranks of the reformers. Already, however, the former state debt limit of two million dollars has been swept away and the state is authorized to issue bonds to the extent of ten millions of dollars upon the security of "the real or personal property of state owned utilities, enterprises or industries, in amounts not exceeding its value," and the intention is quite clear that the school funds shall be used in the purchase of these bonds. Already, too, authority has been given for the entry of the state into all kinds of commercial enterprises and insurance projects, and above all a state owned bank has been created in which all state moneys are required to be deposited, including the school funds while waiting permanent investment, and which may loan its deposits to practically whomsoever it pleases, and which a recent lawsuit disclosed had deposits in a private state bank a large portion of whose assets were post-dated farmers' checks.

These measures, however, are merely compromises, and the real program was outlined in what is known as House Bill 44 of the legislative session of 1917, which submitted an entirely new state constitution, was vigorously championed by the governor, passed the lower house by a large vote, and was only defeated in the Senate by the vote of eight hold-over senators.

This proposed constitution authorized both the state and the municipalities to engage in any public industrial enterprises that they pleased, entirely removed the state debt limit as to state bonds which were issued on the strength of these industries, and what is still more significant amended section 162 of the original constitution so as no longer to authorize the investment of the school funds in United States bonds, but in state bonds and on real estate security only. It also repealed or omitted section 165 of the original constitution which guaranteed the proper investment of the school funds and made it the duty of the legislature to make their unlawful investment or wrongful withholding from investment or diversion a criminal offense, and thus paved the way for the practice of depositing large sums of the money in the state bank or its branches to be by them loaned as they saw fit and, as far as the trust fund was concerned, secured only by the responsibility of

the state bank. The amendments, in short, made it possible for the whole of the school funds to be loaned or kept by the state for the furtherance not of its political and governmental, but its private industrial purposes.

It is quite apparent that this program involves a serious breach of the trust relationship. All that the original congressional grant provided was that the proceeds of the sale of the school lands should be kept as a permanent fund and should be safely invested, and it is quite clear that such directions to an ordinary trustee would in no case be understood to grant the power to loan to himself. It is true that the constitution which was adopted by the new state and which was accepted by the federal Congress provided that such money could be invested "in bonds of school corporations, within the state, bonds of the United States, bonds of the state of North Dakota, or in first mortgages on farm lands," and that the acceptance of this constitution was an acceptance of the method of investment. There was in the same constitution, however, a state debt limit of two million dollars, and it is quite apparent that the bonds contemplated were the bonds which are usually issued by states, in the performance of their educational, charitable, and governmental functions, and that it was never contemplated that the state, any more than any other trustee, should invest the whole fund in its own securities or loan the whole amount to itself, and especially after it had raised the debt limit and entered into general business and loaned its credit to all kinds of industrial enterprises. Much less was it contemplated that the real security should not be the obligation of the state, but the property of industrial institutions, nine out of ten of which must fail for the simple reason that politics and business are poor bedfellows and that the success of every industrial undertaking depends upon business management. When, too, United States government bonds and real estate mortgages and school bonds were all included, they were included for a purpose. It was never intended that the state should use the money to set itself up in business or to loan all of the money to itself.

It was never intended that the state should create a state bank, in which all the state moneys should be required to be deposited, including the school funds while waiting permanent investment, and that these funds should be placed in such a position that they

could be loaned out on short loans to needy state industries, nor that a practice, recently held illegal by the attorney general but now sought to be legalized by statute, of turning all of the taxes and funds into a general fund for general expenses, and the keeping of the accounts separate as a matter of bookkeeping merely, should jeopardize any of the funds, or prevent the educational or other institutions from having them always kept subject to their drafts.

"Trustees cannot use trust moneys in their business, nor embark it in any trade or speculation; nor can they disguise the employment of the money in their business, under the pretense of a loan to one of themselves, nor to a partnership of which they are members."[19]

A trustee, even though he be a sovereign state, cannot loan to himself or personally profit by the funds that he holds.

It is perfectly clear that if any of these things are attempted the United States may interfere in the premises and that it will not be compelled to wait until the fund is wasted or dissipated and then sue an already bankrupt state for damages. Fortunately the trust funds are now intact; either the land is undisposed of or the fund has so far been preserved. Certainly the state could be enjoined from dissipating the property. Certainly even a sovereign state which violates its trust may be removed as a trustee or, if the matter be merely considered contractual, the contract may be held broken and a return of the lands and moneys demanded.

In such a case the proper person to act must necessarily be the Attorney General of the United States, and this not merely because the United States has made a contract with the several states which it is entitled to enforce, but because it is a case where the settlor or creator of the trust has a definite interest and perhaps alone can protect the parties interested.

The *cestuis que trust*, even if they were ascertained and the trust was not charitable, could hardly of themselves obtain adequate relief. Being subjects, they could not sue the trustee in its own courts and would be equally precluded by the eleventh amendment from suing in the federal tribunals. No provision even seems to be made for one who seeks to sue not as a citizen of any one state but as a citizen of the United States itself.

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[19] PERRY ON TRUSTS, § 464.

If an action were brought by the attorney general as a representative of the *cestuis que trust* the same difficulty would be experienced.

There can be no question, however, that the settlor itself may enforce the contract and the trust obligations. The trust was not for the benefit of the state alone or for that of its children as state citizens, but for the benefit of the United States itself and of its own future citizens.

The foundation for the public land grants was laid in the provision of the Northwest Ordinance that "Religion, morality and knowledge being necessary to good government, and the happiness of mankind, schools and the means of education shall forever be encouraged," and though North Dakota is not a part of that territory and its reformers have omitted the words which have been quoted from their proposed constitution, it is none the less clear that the policy of that ordinance was the cause of the state's enrichment. The West indeed was opened for settlement and the school land grants made, not for the benefit of the states, which for the most part were then not in existence, but that in the organization of the territories and the carving them into states, the nation might be strengthened and its future secured. The children to be educated were the children of the nation itself.

It is also well settled that

"If, after the charity is established and is in process of administration, there is any abuse of the trust or misemployment of the funds, and there are no individuals having the right to come into court and maintain a bill, the attorney-general, representing the sovereign power and the general public, may bring the subject before the court by bill or information, and obtain perfect redress for all abuses,"[20]

and it is clear that the attorney general in the case before us is the Attorney General of the United States and the court the Supreme Court of the nation.

The rule of state sovereignty which was announced in the case of *Coyle* v. *Oklahoma*,[21] where the removal of a state capital was sought to be prevented, does not apply where a trust is concerned, and that the United States can interfere in the latter contingency

[20] PERRY ON TRUSTS, § 732.

[21] 221 U. S. 559, 31 Sup. Ct. Rep. 688 (1911).

was clearly intimated by Mr. Justice White, when in the case of *Ashburner* v. *California*[22] he said:

"By the act of June 30, 1864, c. 184, the United States granted to the State of California the Yosemite Valley and the Mariposa Big Tree Grove, 'with the stipulation, nevertheless, that the State shall accept this grant upon the express condition that the premises shall be held for public use, resort, and recreation, and shall be inalienable for all time; . . . the premises to be managed by the governor of the State and eight other commissioners, to be appointed by the executive of California, who shall receive no compensation for their services.' 13 Stat. 325. In 1866 the State of California, by an act of the legislature, accepted this grant 'upon the conditions, reservations, and stipulations contained in the act of Congress.' There cannot be a doubt that, in this way, these interesting localities were, by the joint act of the United States and California, devoted to a special public use. The title was transferred to California for the benefit of the public as a place of resort and recreation. Without the consent of Congress the property can never be put to any other use, and the State cannot part with the ownership. It may be called a trust, but only in the sense that all public property held by public corporations for public uses is a trust. It must be kept for the use to which it was by the terms of the grant appropriated. If it shall ever be in any respect diverted from this use the United States may be called on to determine whether proceedings shall be instituted in some appropriate form to enforce the performance of the conditions contained in the act of Congress, or to vacate the grant. So long as the State keeps the property, it must abide by the stipulation, on the faith of which the transfer of title was made."

If the socialistic fervor of the western states is to continue, a close scrutiny of the use and method of investment of the school funds would seem to be very necessary, and it is equally certain that no political or other reasons should, when occasion demands, prevent the national government from asserting its rights and preserving intact to the children of the future the magnificent heritage that is theirs.

If the fact had been generally recognized that these grants were trusts for a definite purpose and not gifts to the several states for their own peculiar benefit, much of the reckless mismanagement and prodigal waste of the past would have been prevented, and states like Wisconsin would to-day possess and enjoy the immense

[22] 103 U. S. 575, 577 (1880).

tracts of valuable land which were sold often at prices as low as $1.50 an acre that real estate dealers might profit and the political speculator might thrive. Perhaps even now sovereign states may be held liable for their mismanagement as trustees.

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